IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

AFFYMETRIX, INC., a Delaware corporation,

Plaintiff and Counterdefendant,

v.

MULTILYTE LTD., a British corporation,

Defendant and Counterclaimant.
/

No. C 03-03779 WHA

ORDER GRANTING MOTION TO ALTER OR AMEND JUDGMENT, SETTING BRIEFING SCHEDULE AND VACATING HEARING

INTRODUCTION

Despite *repeated* representations by counsel leading the Court to believe that claim construction on the term "binding agent" would be case-dispositive because only literal infringement was being asserted, Multilyte now moves to alter or amend judgment pursuant to FRCP 59(e) on the basis that the summary-judgment order, issued on April 28, 2005, failed to consider the question of infringement under the doctrine of equivalents. In light of the odd procedural history of this action, this order **GRANTS** Multilyte's motion.

STATEMENT

After a technology tutorial, two rounds of briefing and a *Markman* hearing, the Court issued its Order Construing Selected Claim Terms on February 22, 2005. Therein, the term "binding agent" was construed to mean "a molecule used in an immunoassay that is capable of binding to an analyte and has an affinity constant (measured at equilibrium) of 10^{13} liters/mole or less."

Following a status conference held on March 3, 2005, Multilyte was granted leave to file a motion for further claim construction of "binding agent." Meanwhile, Affymetrix was granted leave to file two summary-judgment motions. All three motions were briefed simultaneously. These motions were addressed by two orders issued on April 28, 2005.

The first order granted Multilyte's motion for further claim construction and re-construed the term "binding agent" to mean "a molecule conventionally having one or at most two binding sites and an affinity constant (measured at equilibrium) of 10^{13} liters/mole or less." Because the Court further construed the term "binding site" to mean a structurally and functionally distinct region of a *protein*, this definition expressly included antibodies, binding proteins, receptor fragments and other proteins or protein fragments, but excluded DNA, RNA, oligonucleotides and any other molecules comprised solely of nucleic acids. The non-scientific, plain-meaning definition of "binding site" — *i.e.*, any site where binding occurs, such as the region within a nucleic acid sequence recognized by a protein or protein complex — was explicitly rejected. The second order granted summary-judgment of non-infringement based on the phrases (1) "binding agent" and (2) "loading a plurality of different binding agents . . . onto a support means," the latter of which was unopposed. Judgment was entered accordingly.

ANALYSIS

Multilyte makes its motion pursuant to FRCP 59, under which a party may move for a new trial or to alter a judgment. Such a motion should not be granted unless it is necessary to correct manifest errors of law or fact upon which the judgment is based, if there is newly discovered or previously unavailable evidence, if it is necessary to prevent manifest injustice, or if there is an intervening change in controlling law. *Turner v. Burlington N. Santa Fe R.R. Co.*, 338 F.3d 1058, 1063 (9th Cir. 2003).

To the extent that Multilyte seeks to present further evidence that DNA are molecules with binding sites, this proffer is rejected. The Court will not indulge what is essentially a request for a third round of claim construction on the term "binding agent." There have already been two rounds of briefing. The possibility that the Court would adopt a construction limiting a "binding agent" to molecules having "one or at most two binding sites" was even explicitly

recognized by Multilyte in its opposition brief (Opposition to Motion for Summary Judgment of Non-Infringement Based on the Term "Binding Agent" at 13–15). Because "binding site" was construed to mean a particular region of a protein or protein fragment, this means that DNA, RNA, oligonucleotides and any other molecules comprised solely of nucleic acids contain *zero* binding sites. Given this definition, there is no basis to alter or amend the summary-judgment finding of no literal infringement.

Multilyte correctly argues, however, that due to the simultaneous briefing of the three prior motions, the parties have not had the opportunity to address the issue of infringement under the doctrine of equivalents in light of the new claim construction of "binding agent." To avoid any possibility that the Federal Circuit could consider this a "manifest injustice," Multilyte's motion is **GRANTED**. Regardless, this order finds that entry of final judgment is not appropriate since Affymetrix has not yet dismissed its invalidity and unenforceability claims, although it has expressed a willingness to do so to expedite the appeal process (Opp. at 2, fn. 1).

CONCLUSION

For the foregoing reasons, Multilyte's motion to alter or amend the judgment is **GRANTED**. The hearing on this motion, currently scheduled for **JUNE 9, 2005**, is **VACATED**. This order hereby amends the judgment entered on April 28, 2005, to reflect that it was not a final judgment. The Clerk **SHALL REOPEN THE FILE**.

This order also grants Affymetrix leave to file a summary-judgment motion addressing the issue of infringement under the doctrine of equivalents by **MAY 24, 2005 AT NOON**. If such a motion is filed, Multilyte shall respond by **JUNE 3, 2005 AT NOON** and any reply shall be due on **JUNE 10, 2005 AT NOON**. The hearing would be held on **JUNE 23, 2005 AT 8:00 A.M.** All remaining deadlines, as set forth in the case management order of March 4, 2005, are reinstated.

IT IS SO ORDERED.

Dated: May 17, 2005

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE